IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

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No. ~~736~~, ~~MISCELLANEOUS~~

THOMAS SCHWARTZ,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

In Criminal District Court No. 2 of Dallas County, Texas, petitioner was convicted of the offense of being an accomplice to the crime of robbery. Upon appeal to the Court of Criminal Appeals of Texas, the conviction was affirmed and a motion for rehearing overruled.[1]

Petitioner here assigns as error the admission into evidence of recordings of a number of telephone conversations to which he was a party. This evidence, it is said, corroborated the testimony of other witnesses and thus led to petitioner's conviction. It is

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[1] *Schwartz v. State*, 246 S. W. 2d 174 (Tex. Crim. 1952).

urged that this was a violation of Section 605 of the Federal Communications Act, 47 U.S.C.A. 605, which forbids the divulgence of intercepted wire and radio communications without the consent of the sender.[2]

It is respectfully submitted that this case is not a proper one for review by certiorari in this Honorable Court. The uncontroverted facts of this case reveal that petitioner is guilty of the offense of which he was charged. He was given a fair trial in which he was extended every privilege to which he was entitled under both Federal and State law. In his petition for certiorari, petitioner raises as his federal question a legal point which has previously been decided against him upon a number of different occasions by this and other courts. Therefore, for the reasons to be stated below, it is respectfully submitted that his petition for certiorari should be denied.

STATEMENT OF THE CASE

The facts of this case as set forth in the opinion of the Court of Criminal Appeals are complete and correct but will be briefly summarized here for the convenience of the Court.

William Trent Jarrett and Lester Emmett Bennett forcibly gained admittance to the Dallas, Texas, home of Dr. W. W. Shortal. There they bound the servants, and when Mrs. Shortal returned to the home they forced her to surrender her diamond rings

[2] Section 605 of the Federal Communications Act is set forth in full in the Appendix, p. 11.

and then locked her in a closet. From the Shortal residence they went to petitioner's pawnshop and there left the rings for disposal by him.

At petitioner's trial, Jarrett and Bennett testified that they had entered into a conspiracy with petitioner, whereby they would commit a series of robberies, being furnished by petitioner with firearms and information as to whom to rob. Petitioner was to receive and dispose of the spoils, and then they would divide the proceeds. The Shortal robbery, they testified, was carried out in accordance with this scheme. Petitioner denied the conspiracy, claiming that he received the jewelry as an innocent purchaser for value.

The testimony of Jarrett and Bennett was corroborated by certain recorded telephone conversations between Jarrett and petitioner. The records were made by the Sheriff's department with the cooperation of Jarrett, who was then a prisoner. They were played for the jury in petitioner's trial, and it is this action which is challenged in the petition for certiorari.

Petitioner was found guilty as charged, and he was sentenced to ninety-nine years in the State penitentiary. The Texas Court of Criminal Appeals, the court of last resort for criminal matters in Texas, affirmed the conviction and overruled a motion for rehearing. Petition for certiorari was then filed in the Supreme Court of the United States.

POINT ONE

The admission of recordings of intercepted telephone conversations into the evidence of a trial in

a State court involving a matter of State law is not a violation of the United States Constitution or the Federal Communications Act.

ARGUMENT AND AUTHORITIES

At the outset it should be noted that the recorded telephone conversations in question were obtained without trespass upon petitioner's property. This being true, the instant case comes within the decision of this Court in *Olmstead v. United States*,[3] wherein it was held that the admission of evidence obtained by means of tapping telephone wires into a criminal trial does not constitute an invasion of any rights extended to a defendant under the Constitution of the United States, provided there is no trespass involved. The Court added, however, that Congress has the authority to enact legislation to protect the secrecy of telephone conversations and to render such evidence inadmissible in the trial of a party to such an intercepted conversation. The following language of this Court, taken from a more recent decision, demonstrates that the rule of the *Olmstead* case remains in full force and effect today:

> "The petitioners ask us, if we are unable to distinguish *Olmstead v. United States*, to overrule it. This we are unwilling to do. That case was the subject of prolonged consideration by this court. The views of the court, and of the dissenting justices, were expressed clearly and at length. To rehearse and reappraise the arguments pro and con, and the conflicting views exhibited in the opinions, would serve no good

[3] 277 U.S. 438 (1928).

purpose. Nothing now can be profitably added to what was there said. It suffices to say that we adhere to the opinion there expressed.'"[4]

Thus it is clear that there is no constitutional right involved in this case. If petitioner has any right to be protected, it arises from a statute and not the Constitution.

Subsequent to the decision in the *Olmstead* case, Congress enacted the Federal Communications Act, of which Section 605 is important here. This section renders it illegal to reveal, without the consent of the sender, the contents of any intercepted telephone, wire or radio communication. The Supreme Court of the United States has construed the Act to prohibit Federal officers and other persons from testifying in Federal criminal trials as to interstate messages which were overheard by tapping telephone wires.[5] More recently the ban has been extended to include intrastate, as well as interstate, messages.[6]

Petitioner urges that *Weiss v. United States*, *supra*, is authority for the proposition that evidence obtained by intercepting telephone conversations is inadmissible in State as well as Federal Courts. We readily concede that the decision extends the application of the Federal Communications Act to intrastate messages. But it does not follow that the Act forbids the admission of such evidence into a trial in a State court, in which matters of State law only are involved. In the *Weiss* case, this Court reviewed

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[4] *Goldman v. United States*, 316 U.S. 129, 135, 136 (1942).
[5] *Nardone v. United States*, 302 U.S. 379 (1937).
[6] *Weiss v. United States*, 308 U.S. 321 (1939).

the action of a *Federal* District Court. There was presented no question concerning the admissibility of any evidence in a State trial. The sole question before this Court was whether a Federal trial court properly received evidence obtained by tapping telephone wires if the communications were intrastate. Therefore, it is submitted that the decision is inapplicable here.

Article 727a, Texas Code of Criminal Procedure (Vernon 1948), reads as follows:

> "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

This statute formerly provided that evidence obtained in violation of the Constitution *or laws* of either the United States or Texas was inadmissible in a Texas criminal trial.[7] It was amended, however, so that now the only Federal restrictions upon the admissibility of evidence in Texas criminal trials are to be found in the Constitution of the United States. Thus, the Texas Courts are no longer bound by Federal statutes in this respect.[8] There is no

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[7] Article 727a, before amendment to its present form read as follows:

> "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

[8] *Montalbano v. State*, 116 Tex. Crim. 242, 34 S. W. 2d 1100 (1931).

Texas law which forbids the admission of evidence of the kind complained of here.

A recent decision of this Court has upheld the right of State courts to accept or reject evidence according to the laws of the individual state.[9] Thus, the mere fact that certain evidence is inadmissible in a Federal trial does not render the same evidence inadmissible in a State trial. In *Wolf v. Colorado, supra*, the Court stated the issue there in terms which precisely summarize the question to be resolved in this proceeding, as follows:

> "The precise question for consideration is this: Does a conviction by a State court for a State offense deny the 'due process of law' required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States . . ."

The decision in the case answered the question in the negative.

It has been squarely held in a number of different decisions that Section 605 of the Federal Communications Act does not prohibit the admission of evidence obtained by tapped telephone lines into a trial in a State court.[10] This Court has approved most of

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[9] *Wolf v. Colorado*, 338 U.S. 25 (1949). See also *State v. Mara*, 78 A. 2d 922 (N.H. Sup. 1951).

[10] *People v. Stemmer*, 83 N.E. 2d 141, affd. *Stemmer v. New York*, 336 U.S. 963 (1949); *Hubin v. State*, 23 A. 2d 706, cert. den. *sub nom. Neal v. Maryland*, 316 U.S. 680 (1942); *People v. Channell*, 236 P. 2d 654 (Cal. 1951); *Harlem Check Cashing Corp. v. Bell*, 68 N.E. 2d 854 (N.Y.

these decisions, either by denial of certiorari or by affirmance. Less than a year ago, the same contention was presented to this Court in a case which arose in Texas, and certiorari was denied.[11]

Under the authority of its inherent police power, the State of Texas has undertaken to regulate extensively its criminal prosecutions and the admission of evidence therein. A Federal statute must be presumed to affect only Federal jurisdiction and not to supersede a State's exercise of police power unless there is a readily apparent manifestation of Congressional intent that it should operate thus.[12] In the absence of a clear and unequivocal expression to the contrary, it is not to be presumed that Congress, by the passage of the Federal Communications Act, intended to circumscribe in any manner the power of the State in this respect. There is no such expression of Congressional intent to be found in the Statute under consideration here. We, of course, do not deny the supremacy of an act of Congress in a proper situation, but it is submitted that the Federal Communications Act is not an expression of Congressional intent to forbid the introduction of evidence obtained by tapping telephone wires into a trial in a state court.

In summary, then, it may be stated that petitioner was tried in a Texas court for a violation of Texas

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Ct. App. 1946); *People v. Kelley*, 137 P. 2d 1 (Cal. Sup. 1943); *Rowan v. State*, 3 A. 2d 753 (Md. Sup. 1939).

[11] *Scholl v. State*, 235 S.W. 2d 639 (Tex. Crim. 1951), cert. den. 342 U.S. 834 (1951).

[12] *Townsend v. Yeomans*, 301 U.S. 441, 454 (1937); *Atchison Topeka & Santa Fe Railway Co. v. Railroad Commission of California*, 283 U.S. 380, 392 (1931); *Savage v. Jones*, 225 U.S. 501, 533 (1912).

law. Certain recorded telephone conversations were admitted into the evidence at this trial. This is not repugnant to the Constitution of the United States, nor is it a violation of State law. Although this evidence would have been inadmissible in a Federal criminal trial, it does not follow that the same holds true in a State court. On the contrary, it has been held that such evidence is admissible in the absence of a State law which forbids it. There is no such prohibition imposed by Texas law. It is therefore respectfully submitted that this is not a proper case for review by certiorari in this Honorable Court.

CONCLUSION

It is respectfully submitted that this case is not a proper one for review by this Court and that the petition for writ of certiorari should be denied.

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May, 1952.

APPENDIX

THE FEDERAL COMMUNICATIONS ACT

47 U.S.C.A. § 605

Section 605. *Unauthorized publication or use of communications.* "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having

become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of the State of Texas (R. 220-226) is reported at ——— Tex. Crim. Rep. ———, 246 S.W. (2) 174. The opinion on the motion for rehearing (R. 232-234) is reported at —— Tex. Crim. Rep. ———, 246 S.W. (2) 179.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on the 14th day of November, 1951, to which petitioner filed a Motion For Rehearing, which motion was overruled on the 31st day of January, 1952. The jurisdiction of this Court is invoked under 28 U.S. Code annotated Section 1257(3). Defendant objected to the admission of certain phonograph records obtained in violation of Section 605, Title 47, U.S. Annotated, at the time of trial before the Criminal District Court No. 2 of Dallas County, Texas, the Honorable Henry King, District Judge, presiding, which objection was overruled and exception thereto duly noted. (R. p. 18). The objection was renewed in Defendant's First Amended Motion for a New Trial (R. p. 21), which motion was overruled, and judgment was entered (R. p. 28), whereupon defendant in open court excepted to such judgment and gave notice of appeal to the Court of Criminal Appeals of the State of Texas, at Austin, Texas. (R. p. 29). Defendant further raised the objection in his Bill of Exceptions No. 1 to which no qualification was appended by the said Henry King, District Judge (R. p. 30). Defendant cited as error the failure to exclude the evidence obtained in violation of Section 605, but the Court of Criminal Appeals of the State of Texas in its opinion did not pass on the question of whether or not a violation had occurred, but characterized the statute as a procedural one, hence not

applicable (R. p. 223). Defendant in his Motion For Rehearing again urged the court to correct the error of denying petitioner his right to have the phonograph records excluded as having been obtained in violation of Section 605 (R. p. 223), but the court in its opinion overruling the Motion For Rehearing stated that they adhered to their views expressed in the original opinion (R. p. 232). Whereupon petitioner obtained a stay of execution of 90 days pending the perfection of his application for a Writ of Certiorari in this Court. (R. p. 234). The Petition for a Writ of Certiorari to the Court of Criminal Appeals to the State of Texas was filed on April 22, 1952, and was granted on June 9, 1952.

QUESTION PRESENTED

Whether the Court of Criminal Appeals of the State of Texas erred in denying the supremacy of the Federal Communications Act, 48 Stat. 1103, 47 U.S. Code Annotated 605 (Supp. 1951) in violation of Article VI of the Constitution of the United States, thus denying petitioner a right claimed under a statute of the United States.

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix A, infra, pp. 25-27.

STATEMENT OF THE CASE

On the 25th of March, 1950, your petitioner, Thomas Schwartz, was indicted by the Grand Jury of Dallas County, Texas, charged with being an accomplice to armed robbery. Specifically the indictment charged "that on February 17, 1950, one William Trent Jarrett robbed Mrs. Minnie Shortal of valuable jewelry, and that prior to the commission of said offense by the said William Trent Jarrett, the said defendant Thomas Schwartz did unlawfully and wilfully advise, command and encourage the said William Trent Jarrett to commit said offense, the said Thomas Schwartz not being present at the commission of said offense by the said William Trent Jarrett."

On the third trial of this case before a jury in the Criminal District Court of Dallas County, Texas, your petitioner was found guilty and the jury assessed a penalty of ninety-nine (99) years in the penitentiary. Upon appeal the case was affirmed by the Court of Criminal Appeals of Texas, to which Court this Writ of Certiorari is directed.

William Trent Jarrett and a man by the name of Lester Bennett were indicted for the actual robbery of Mrs. Minnie Shortal, a resident of Dallas County, Texas. After the affirmance of petitioner Schwartz' case, Bennett pleaded guilty before the Court and the Court sentenced him to serve eight years in the penitentiary. Jarrett was returned to the State of Kentucky, where he was already under a

life sentence before he escaped and came to Texas, no formal disposition having been made of the robbery case against him in Dallas, Texas.

The evidence reveals that on the afternoon of February 17, 1950, the robbers Jarrett and Bennett, armed with pistols, entered the fashionable home of the prosecutrix, Mrs. Minnie Shortal, and at pistol-point robbed her of certain diamond rings and jewelry. At the time of the perpetration of the robbery, they locked her in a closet and tied up with cords the butler and maid servants.

The robbers Bennett and Jarrett then took the jewelry in question to the pawn shop of your petitioner Thomas Schwartz to pawn or dispose of same. Your petitioner testified that he agreed to purchase the jewelry after same had been appraised by a competent appraiser. He denied he had any part in planning the robbery.

The defendants Jarrett and Bennett, the actual robbers, turned State's evidence and testified for the State, Jarrett being the State's star witness. Jarrett testified it was Schwartz who turned him over to the police.

Schwartz returned all of the jewelry to Mrs. Shortal through the witness Fritz, Captain of Detectives.

Under the law of the State of Texas the testimony of an accomplice must be corroborated and the principal corroboration relied upon by the State was an intercepted telephonic conversation which was recorded, the conver-

sation being between your petitioner Schwartz and the robber Jarrett.

The testimony reveals that while Jarrett was confined in jail, that he was taken by the District Attorney and his assistants into a room in the Sheriff's office, where a recording machine was set up. Under the direction of the District Attorney's staff, Jarrett telephoned to Schwartz at his pawn shop, and some fifteen or twenty conversations were intercepted and recorded without the knowledge or consent of your petitioner. Six of these recorded conversations were played to the jury on the phonographic record. It is the contention of your petitioner that without this testimony a conviction could not be had, and that "wire tapping" evidence brought about your petitioner's conviction.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Criminal Appeals of the State of Texas erred:

(1) In holding that Section 605, Title 47, U.S. Code Annotated, known as the Federal Communications Act, is a federal procedural statute and not binding on all states and judges as the supreme law of the land.

(2) In denying to petitioner his rights granted him by Section 605, Title 47, U.S. Code Annotated, against divulgence of intercepted communications without his consent and thereby denying the supremacy of an Act of

Congress in violation of Article VI of the Constitution of the United States.

SUMMARY OF ARGUMENT

The Court of Criminal Appeals of the State of Texas refused to give effect to Section 605 of the Federal Communications Act on the ground that it was a federal procedural statute and did not govern in Texas. Such characterization was erroneous and denied petitioner a right granted him under a federal statute. The rule in Texas pursuant to the mandate of this Court is that a state may not refuse enforcement of a federally created right. By characterizing the right in question as one prescribing merely a rule of court, the Court of Criminal Appeals of the State of Texas has by label sought to escape the mandate of this Court. It is the right itself and not the label which should govern. The right, being one which only the sender can invoke and for the infringement of which penal sanctions may be imposed, is clearly substantive. The use of erroneous characterization to avoid recognition of the right ought not to be permitted to stand.

Irrespective of label, the Federal Communications Act is an exercise of legislative authority by Congress in an area in which it may, if it chooses, exercise exclusive authority. It is necessary only that Congress manifest such an intent. The Act created a statutory system of regulation and control over interstate and foreign commerce, and interstate commerce, where necessary, for

the protection of interstate commerce. Section 605 was but one of the miscellaneous provisions in the general plan of regulation. It was adopted in furtherance of the free flow of commerce as a national public policy to prevent interference with and interception of interstate communications. The anomalies which result from any other construction defeat the very purpose of the section and withdraw the protection Congress sought to provide. The Act taken as a whole clearly manifests Congressional intent to promulgate a national policy for the protection of interstate communications. The failure of the Texas Court of Criminal Appeals to enforce such policy is a denial of the supremacy of an Act of Congress in violation of Article VI of the Constitution of the United States, which has denied petitioner a right claimed under a federal statute. Such a result cannot be permitted to stand.

ARGUMENT

I.

WHERE AN ACT OF CONGRESS CREATES A RIGHT IN AN INDIVIDUAL AND PROVIDES PENAL SANCTIONS FOR THE INFRINGEMENT THEREOF, SUCH AN ACT CANNOT BE CHARACTERIZED AS PROCEDURAL, HENCE NOT BINDING ON ALL STATES AND JUDGES AS THE SUPREME LAW OF THE LAND.

The statute, *48 Stat. 1103, 47 U.S.C.A. 605, 48 Stat. 1100, 47 U.S.C.A. 501*, insofar as here pertinent, prohibits

"intercepting any communications" by any person "not being authorized by the sender," and further prohibits divulgence or publication "of such intercepted communication to any person." Moreover, "any person who willfully and knowingly does . . . any act . . . prohibited . . . shall upon conviction . . . be punished . . . by a fine of not more than $10,000 or by imprisonment for a term not more than two years, or both."

The Court of Criminal Appeals makes it clear in its opinion that its decision affirming the conviction of petitioner rests primarily upon the intercepted communications between petitioner and Jarrett when it says:

> "We feel that the recorded conversations between Jarrett and appellant hereinafter discussed under Bill of Exceptions No. 1 corroborate Jarrett's and Bennett's version of the transaction and disprove appellant's defense." (R. 222)

The Court recognized appellant's timely objections to the intercepted communications in claiming his right granted under the Federal Communications Act, but says:

> "Without holding this evidence to have been obtained in violation of Section 605, we address ourselves rather to the question of the applicability of a Federal procedural statute to a trial in a State Court." (R. 223).

The Court of Criminal Appeals erred in characterizing the Federal Communications Act as a procedural statute. The particular provision involved is but one of the miscel-

laneous provisions of a regulatory act which was designed "for the purpose of securing a more effective execution of this policy by centralizing authority . . . and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication." *(48 Stat. 1064, 47 U.S.C.A. 151).*

The source books define a substantive law as one that conveys substantive right to an individual, a procedural law as one that directs the method of procedure to protect the substantive rights given the individual. *Words and Phrases, Vol. 2, p. 392; Vol. 40, p. 524.*

Rules of evidence constitute substantive law and cannot be governed by rules of court. *State vs. Pavelich, 153 Wash, 379, 279 P. 1102.*

This Court has held the right to be a personal one. In *Goldstein vs. U.S., 318 U.S. 114, 62 S.Ct. 1000, 86 L. Ed. 1312 (N.Y. 1942)*, this Court held that Section 605 is intended to protect only the sender and he alone can invoke it. Moreover, it was held in that case that intercepted communications are admissible against one not a party to the communications. It seems clear, therefore, that Congress created a substantive right in individuals to be free from interference in their use of communications facilities. Hence, the statute does not prescribe procedure, it creates a right in an individual which he alone can claim.

In order to further protect the right created by the Act, Congress established a general penalty for the viola-

tion of such right. *48 Stat. 1100, 47 U.S.C.A. 501.* Clearly, then, a statute which creates a personal right in an individual, and makes the infringement of such right a felony, can in no sense be characterized as procedural.

The harm in such erroneous characterization as made by the Court of Criminal Appeals of the State of Texas is that it nullifies the intent of Congress, as construed by this Court, and in so doing ignores the mandate of Article VI of the Constitution of the United States.

If the Act is procedural in the sense that it merely prescribes a rule of court, then it would not be binding upon the courts and judges of the State of Texas. By so characterizing it, the Court avoided the necessity of expressly denying the supremacy of an Act of Congress. If the Federal Communications Act had expressly created a cause of action for the violation of Section 605, then "(T)he Act creating the cause of action, being enacted pursuant to the United States constitution, is the supreme law of the land, and binding on state courts and judges." *Bowles vs. Angelo, 188 S.W. (2) 691, 694* (Tex. Civ. App. 1945). The court in the Bowles case cited *Claflin vs. Houseman, 93 U. S. 130, 136; 23 L. Ed. 833*, quoting therefrom:

> "Legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction."

Irrespective of characterization, Congress has the power to prescribe a rule which would become the supreme law of the land. The federal law has reached into procedure in other instances. This Court has held that internal revenue agents may not be compelled by State courts to testify in a manner prohibited by treasury department regulations. *Boske vs. Comingore, 177 U.S. 459, 20 S.Ct. 701 (1900).* Likewise, Congress has provided in the *Bankruptcy Act. 30 Stat. 548 (1898) amended 52 Stat. 847 (1938), 11 U. S. Code Annotated 25a(10) (1940),* that "no testimony given by him (a bankrupt) shall be offered in evidence against him in any criminal proceeding." Irrespective of whether it purports to govern procedure or not, and nothing in the statute lends support to the theory that it is a procedural statute, Section 605 created a right which, if it promulgated national public policy, became the supreme law of the land, binding on all judges in all states, "anything in the Constitution or Laws of any State to the contrary notwithstanding."

Under the Texas rule of *Bowles vs. Angelo, 188 S.W. (2) 691,* the Texas courts are required to give recognition to a federally created right. The failure to recognize the right in this case has denied the right in contravention of Article VI of the Constitution of the United States.

The Court of Criminal Appeals further justified its decision by reference to *Article 727a, Vernon's Code of Criminal Procedure,* as amended. Prior to the amendment, the provision operated to exclude, inter alia, evidence ob-

tained in violation of a statute of the United States of America. In 1929 the statute was amended to permit the use of evidence obtained in violation of a federal statute. *Montalbano vs. State, 116 Tex. Crim. Rep. 242, 34 S.W. (2) 1100 (Tex. Crim. App. 1930).* This statute precedes the adoption of Section 605 and cannot control where Congress has exercised its legislative power in an area in which it may constitutionally do so, and has by such legislation promulgated national policy. Moreover, state courts are under a duty to enforce federal statutes. In *Testa vs. Katt, 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967, 172 A.L.R. 225 (1947),* this Court held that state courts may not decline to enforce a federal statute on the ground that the federal statute contravenes the local policy of the State. To like effect are *Claflin vs. Houseman, 93 U.S. 130, 136, 23 L. Ed. 833,* and *Mondou vs. New York, N.H. & H. R. Co., 223 U.S. 1, 57, 32 S.Ct. 169 (1912).*

This Court held in *Nardone vs. U.S., 302 U.S. 379, 58 S.Ct. 275 (1937)* that the evidence obtained in violation of the right created by Section 605 must be excluded. In a subsequent hearing of this case, *Nardone vs. U.S., 308 U.S. 338, 340, 84 L. Ed. 307, 311,* this Court, per Mr. Justice Frandfurter, said in reference to the opinion in the prior hearing:

> "That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found

that the logically relevant proof which Congress outlawed, it outlawed because inconsistent with the ethical standards and destructive of personal liberty."

This Court has further held that the right created by Section 605 is a personal right and exists only in the sender, and he, alone, can claim it. *Goldstein vs. U. S., 318 U.S. 114, 62 S. Ct. 1000 (1942).* It follows therefore that Congress having created a right in individuals, which only the individual whose right was infringed can claim, neither such right nor the statute creating it can be characterized as merely promulgating a rule of court. The refusal of the Court of Criminal Appeals of the State of Texas on the ground that it was not bound by the statute is clearly erroneous and should be reversed.

II.

THE ADMISSION OF RECORDED COMMUNICATIONS, INTERCEPTED WITHOUT THE CONSENT OF THE SENDER, IS A VIOLATION OF A RIGHT CREATED BY ACT OF CONGRESS AND THE FAILURE OF A STATE COURT TO RECOGNIZE SUCH RIGHT IS A DENIAL OF THE SUPREMACY OF AN ACT OF CONGRESS IN VIOLATION OF ARTICLE VI OF THE CONSTITUTION OF THE UNITED STATES.

The decision of the Court of Criminal Appeals of the State of Texas is erroneous because of the failure to recognize the supremacy of an Act of Congress in violation of Article VI of the Constitution of the United States. Even

if there were a fixed policy in Texas contrary to the policy expressed by Congress in Section 605, it would not alter the case.

> "For the policy of the federal Act is the prevailing policy in every state. Thus, in a case which relied chiefly upon the *Claflin* and *Mondou* precedents, this Court stated that a state cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers:'" *Testa vs. Katt, 330 U. S. 386, 393*, 91 L. Ed. 967, 972.

It would appear, therefore, to be settled by this Court that rights created by valid laws of the United States are the Supreme Law of the land, and the judges in every state and all courts are bound thereby.

This Court in *Nardone vs. U.S., 302 U.S. 379, 58 S.Ct. 275 (1937)*, in construing Section 605, held that the words of Section 605 "forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that 'no person' shall divulge or publish the message or its substance to 'any person.' To recite the contents of the message in testimony before a court is to divulge its message." Neither the language of the statute nor the language of the Court's opinion limit in any way the tribunal in which this prohibition is to operate. The Court further states:

> "Congress may have thought it less important that some offenders should go unwhipped of justice than

> that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt Section 605 as evoked the guaranty against practices and procedures violative of privacy embodied in the Fourth and Fifth Amendments of the Constitution." *Nardone vs. U.S., 302 U.S. 379, 383. 58 S.Ct. 275 (1937).*

In subsequent hearing of this case, *Nardone vs. U. S., 308 U. S. 338, 340, 84 L. Ed. 307, 311,* this Court, per Mr. Justice Frankfurter, made more explicit its views of Section 605 as an expression by Congress of public policy in protecting the realm of privacy, unprotected by the Constitution, but capable of infringement through zeal or design, by saying:

> ". . . meaning must be given to what Congress has written, even if not in explicit language, so as to *effectuate the policy which Congress has formulated* (Italics added) . . . To reduce the scope of Section 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve . . . *would largely stultify the policy which compelled our decision in Nardone vs. United States.*" . . . (Italics added)

The Court went on to declare, in reference to the decision in the first Nardone case, "that decision was not the product of a merely meticulous reading of technical language. *It was the translation into practicality of broad considerations of morality and public well-being.*" (Italics added)

During the same term in which the second Nardone case was decided, this Court by unanimous decision held in

Weiss vs. U. S., 308 U. S. 321, 84 L.Ed. 298 (1940), that since it is impossible to separate intrastate from interstate communications as they pass over telephone wires, Section 605 must be read to prevent both kinds of interception, that the exclusion of evidence obtained in violation of Section 605 is not limited to interstate and foreign commerce, but that Congress has the power, when necessary for the protection of interstate commerce, to regulate intrastate transactions. Shreveport Rate Case *(Houston, E. & W. T. R. Co. vs. U.S., 234 U.S. 342, 58 L.Ed. 1341, 34 S.Ct. 833.)*

That there was an interception in the case at bar is beyond doubt. The circumstances here are virtually identical with those in *U.S. vs. Polakoff, et al, 112 Fed. (2) 88 (C. C.A. 2nd)*, cert. denied 311 U.S. 653, 85 L.Ed. 418 (R. 28 31, 34-44, 212-215). The facts are clearly distinguishable from those in *Goldman vs. U.S., 316 U.S. 129, 86 L.Ed. 1322 (1942)* and the rule there applied by this Court is not here applicable. Moreover, it is important to note that in the case at bar, the state did not merely offer testimony concerning the conversations, but the recordings themselves were offered in evidence (R. 34-44) and admitted in evidence by the trial judge, not by way of impeachment, but as direct evidence.

The decision of this Court in the Weiss case, supra, clearly shows that Congress did not limit the application of Section 605 to the Federal courts. Nowhere does the statute make any reference to courts. The Nardone cases,

together with the Weiss case, make it abundantly clear that the statute was the promulgation of a broad public policy in a field in which Congress was competent to legislate under authority of the Constitution. As this Court has said, any other holding would be denying "a decent respect for the policy of Congress." The language of the statute commands that:

> . . . "no person not being authorized by the sender shall intercept any communication and divulge or publish . . . such intercepted communication to any person." *48 Stat. 1103, 47 U.S. Code Annotated 605.*

There are no words of limitation in this clause such as exists with reference to the other clauses in the section. The statute does not prescribe a rule of court or procedure, it states a rule of substance, for the infringement of which penal sanctions may be imposed. *48 Stat. 1100, 47 U.S. Code Annotated 501.* This Court, in the Weiss case, refused to engraft by construction restrictions and limitations which do not appear in the statute. The Court found that the changed wording in the second and fourth clauses had significance and were not inadvertent. There is nothing in the language of the statute to show that Congress intended to limit the prohibition to Federal courts. Indeed, there is no holding that there exists such a limitation as to any court. If the policy is to be effective and the public policy upheld, the Court cannot engraft restrictions and limitations which appear neither in the Section involved herein, nor in the Federal Communications Act. *48 Stat.*

1064, et seq., 47 U. S. Code Annotated 151, et seq., of which Section 605 is but one of the miscellaneous povisions.

"Wire tapping first became a matter of public concern in the twentieth century." *Westin, The Wire-Tapping Problem, An Analysis and a Legislative Problem, 52 Columbia L.Rev. 165* (Feb. 1952). Section 605 was a part of the revision of the Radio Act of 1927, which legislation transferred jurisdiction over radio, telegraph and telephone to a new agency, the Federal Communications Commission. The statutory system clearly was a manifestation by Congress of their intent to exercise their power in this field. The rule that a Federal statute is presumed to affect only Federal jurisdiction as contended by the State in relying on *Townsend vs. Yeomans, 301 U.S. 441 (1937); Savage vs. Jones, 225 U.S. 501 (1912); Atchison, Topeka & Santa Fe Railway Co. vs. Railroad Commission of California, 283 U.S. 380 (1931)* does not apply where, as here, Congress has plainly manifested its intent to impose a uniform system of control and regulation over interstate and foreign communications and over intrastate communications where necessary for the protection of interstate commerce.

Should the Court refuse to so hold, the protection afforded by the statute and the underlying policy, which this Court has documented in great detail, against invasion of privacy and protection of commerce, would be narrowed to the vanishing point. Hearing before the Subcommittee

to Investigate Wiretapping in the District of Columbia, Sen. Rep. No. 2700, 81st Cong., 2nd Sess. (1950); Hearings before a Subcommittee on Interstate Commerce pursuant to Sen. Res. 224, 76th Cong., 3rd Sess. (1940); 86 Cong. Rec. 3103 (1940).

It is not always public officers who use wire-tapping to secure information in criminal cases. Telephone monitoring is frequently used by private persons for private purposes. Sometimes the tapping is done by government agencies, by Congressional or state legislative committees, or by rival political administrations. Sometimes tapping of conversations is done by law firms or corporations, and the art is certainly a stock-in-trade of innumerable private detective offices. Training centers have been set up under various sponsorship to train tappers. Private persons possess, use and even advertise the availability of the instruments necessary or provide the services for a fee. *Westin, The Wire Tapping Problem, 52 Columbia L. Rev. 165, 168* (Feb. 1952). It would seem that the Federal Communications Commission order, Docket No. 6787, May 20, 1948, requiring the tone warning whenever a person uses a recording device, can be disregarded with impunity.

If this Court holds Section 605 applicable only to Federal Courts, it becomes a simple matter for the federal officers to avoid its effect. Congress can grant, and on many occasions has granted, concurrent jurisdiction to state courts, even to prosecute federal crimes in state courts. In the early days of the republic, Congress did grant con-

current jurisdiction to the state courts to enforce federal penal statutes, and may constitutionally do so again. *Warren, Federal Criminal Laws and the State Courts*, 38 Harvard L. Rev. 545. Moreover, in most instances where a federal crime has been committed, there has likewise been a violation of a state penal statute, so that federal authorities could easily defer to state prosecuting authorities, and federal officers could testify in state courts as to the contents of any intercepted communications. It cannot be presumed that Congress intended or would tolerate any such result. Such a result could lead to an anomalous situation. Under the rule of *Erie vs. Thompkins, 302 U.S. 671, 58 S.Ct. 50, 304 U.S. 64, 58 S.Ct. 817 (1938)*, in a diversity case, the Federal district court must apply the substantive law of the state in which it sits. If a burden of proof question is characterizable as substantive for *Erie vs. Thompkins* purposes, *Sampson vs. Channel, 110 F. (2) 754* (C. C. A. 1st), cert. denied, *310 U.S. 650, 60 S.Ct. 1099*, a fortiori, admissibility of evidence would be so regarded. If the local law were similarly characterized, it would then appear that in a diversity case a Federal district court would be obliged to admit wire-tap testimony, even though this Court has held otherwise. Unless Section 605 superseded applicable state rules, the state rule would govern. It clearly could not have been the intent of Congress to regulate interstate commerce in a manner in which the rules would vary from state to state. It appears clear that the Federal Communications Act, being a valid

exercise of Congressional authority in an area in which Congress is authorized to legislate, is an expression of national policy which supersedes local rules and must be given effect as the supreme law of the land pursuant to Article VI of the Constitution of the United States. No state may decline to enforce the statute because of any conflict with local law or policy. There are many instances in which Congress under its commerce powers has pre-empted the field of regulation and control. *Southern Pac. R.R. Co. vs. Arizona, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915; Southeastern Underwriters Assoc. vs. South Carolina, 322 U.S. 533, 58 S. Ct. 1162, 88 L. Ed. 1440.* Congress can also defer to the states and permit them to occupy the field, *Prudential Insurance Company vs. Benjamin, 328 U.S. 408 (1946)*, or can permit concurrent jurisdiction where to do so does not unduly burden interstate commerce. *Ramaswamy, The Commerce Clause In The Constitution of The United States.* (1948).

The interest sought to be protected by Section 605 pursuant to a system of national uniform regulation is not one in which Congress can be presumed to have deferred to the states. The very purpose of the section is to protect the integrity of interstate communications. Clearly, then, by the Act, Congress has established national policy, which precludes the states from refusing enforcement.

The situation in the case at bar is not to be confused with the rule of *Wolf vs. Colorado, 338 U.S. 25, 93 L. Ed. 1782.* That case concerns the Fourteenth Amendment,

and the admissibility of evidence obtained in violation of same. The right involved herein is not claimed to be a constitutional right, except insofar as a denial of such right by the State of Texas denies the supremacy of an Act of Congress. Neither is the *Olmstead* case, *277 U. S. 438 (1928)* pertinent to the case at bar.

The cases cited by the Attorney General of Texas in his brief opposing the Writ of Certiorari either were prior to the *Weiss* case or come within the rule of the *Goldman* case. *Hubin vs. State, 180 Md. 279, 23 A. (2) 706,* cert. den. sub. nom. *Neal vs. State of Maryland, 316 U.S. 680, 62 S.Ct. 1107, 86 L.Ed. 1753; People vs. Channell, 236 P. (2) 654 (Cal. App. 1951); People vs. Kelly,* 22 Cal. (2) 169, 122 P. (2) 1, cert. den. 320 U.S. 715, 64 S.Ct. 264, 88 L.Ed. 1420, rehearing den. 321 U.S. 802, 64 S. Ct. 527, 88 L.Ed. 1089; *Rowan vs. State,* 175 Md. 547, 3 A. (2) 753. The New York cases, *People vs. Stemmer,* 83 N.E. (2) 141, aff'd. by divided court, 336 U.S. 963 (1949); *Harlem Check Cashing Corp. vs. Bell.* 68 N.E. (2) 854 (N.Y. Ct. App. 1946), cannot be deemed controlling in the absence of a clear ruling by this Court.

The issue presented here is one which only this Court can resolve. There is a marked increase in the invasions of privacy and encroachments on individual liberties resulting from interference with communications facilities. Congress promulgated a public policy for the protection of interstate commerce and there has been no change in the philosophy which gave rise to the public policy expressed

by Section 605, and no indication that the policy has been altered. The policy was not intended to permit the states to vary it in accordance with the local law of each state. The policy, if it so intended, could not be regarded as a "rule of morality and public well-being," nor could it have guaranteed the freedom from interference of interstate communications facilities.

CONCLUSIONS

For the reasons stated, it is respectfully submitted that the judgment of the Court of Criminal Appeals of the State of Texas should be reversed.

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APPENDIX

A. Statutes

48 Stat. 1103, 47 USCA 605:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foregn communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person, other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to a proper accounting or distributing officers of the various communicating centers over which the communicaton may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a Court of Competent Jurisdiction, or on demand of other lawful authority;

And no person not being authorized by the sender shall intercept any communications and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted comunication to any person;

And no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;

And no person having received such intercepted communications or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto:

PROVIDED, that this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

48 Stat. 1100, 47 USCA 501:

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term not more than two years, or both.

Article 727(a), Vernon's Code of Criminal Procedure:

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or Laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

48 Stat. 1064, 47 USCA 151:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.